

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JENNIFER BURKO,

Plaintiff,

vs.

Case No.

ANDREA LECROY, STEPHEN  
LATHROP and ERIC SMITH, In their  
official capacities,

Defendants.

\_\_\_\_\_/

Timothy Barkovic (P-29797)  
Barkovic & Malkiewicz  
Attorneys for Plaintiff  
25805 Harper Avenue  
St. Clair Shores, Michigan 48081  
586/773-2120

\_\_\_\_\_/

**COMPLAINT**

NOW COMES, Plaintiff, Jennifer Burko, by and through her attorney Timothy Barkovic and brings this complaint against defendants. In support of the complaint, plaintiff, states the following:

1. Plaintiff, at all times relevant hereto has resided in the City of Saint Clair Shores, State of Michigan.

2. Defendant Andrea Lecroy, resides in the City of Saint Clair Shores, State of Michigan and on a date prior to the filing of the instant complaint, filed a criminal complaint against the plaintiff. The complaint(s) made by defendant, Lecroy gave rise to a criminal complaint being filed against the plaintiff for alleged violations of Michigan statute, which is the subject of this litigation. Defendant continues to aid, assist and maintain the prosecution of this plaintiff for plaintiff's exercising her rights under the First Amendment to the United States Constitution.

3. This action is brought against defendant Stephen Lathrop in his official capacity and an agent or employee of the City of Saint Clair Shores, State of Michigan, specifically a member of the City of the Saint Clair Shores Police Department. Defendant Lathrop has caused to be filed against this plaintiff a criminal complaint, exclusively and solely based on plaintiff's exercise of her constitutional rights to free expression. Defendant, Lathrop continues to aid and assist in the prosecution of the plaintiff and in doing so has and will deprive plaintiff of her rights under the First and Fourteenth Amendments to the United States Constitution.

4. This action is brought against defendant Eric Smith in his official capacity as the duly elected prosecuting attorney, in and for the County of Macomb, State of Michigan. Defendant Smith, through his agents and

employees have instituted and maintained criminal proceedings against this plaintiff, based solely on her expression of ideas, thoughts, beliefs, including speech, each of which is protected by the First and Fourteenth Amendments to the United States Constitution.

5. Jurisdiction is conferred on this court by 28 USC § 1331, this being a civil action arising under the Constitution and laws of the United States.

6. Jurisdiction is also conferred on this court by 28 USC § 1343(a)(3) and (4), 28 USC § 2201 and 2202 and 42 USC § 1983 and 1988, this being an action for injunctive and declaratory relief and further equitable relief authorized by law to redress deprivations under color of law of rights, privileges and immunities secured by the United States Constitution.

7. Venue is proper in this court because one or more of defendants reside within this district, or, in the alternative, all or a substantial portion of the acts and omissions giving rise to this cause of action occurred within this district. 28 U.S.C. § 1391(b).

8. At all time relevant to this action and in taking the various actions described in this complaint, defendants, have acted and threatened to act under color of law and were effecting and will effect, the custom, polices, laws and rules of the State of Michigan.

**FACTS GIVING RISE TO PLAINTIFF'S CONSTITUTIONAL CLAIMS**

9. On or about May 5, 2009, Plaintiff caused to be posted on the internet, on a website known as Craigslist, two messages.

10. Following the posting of the messages, defendant Lecroy made a report(s) to the City of Saint Clair Shores Police Department, seeking assistance.

11. The City of Saint Clair Shores Police Department conducted an investigation which revealed that this plaintiff posted the messages on the internet.

12. Following the investigation, defendant Lathrop petitioned defendant Eric Smith to initiate criminal charges against plaintiff, for the act of posting these messages on the internet.

13. On or about October 8, 2009, defendant Lathrop and Smith instituted criminal proceedings against this plaintiff pursuant to MCLA 750.411s.

14. MCLA 750.411s seeks to criminalize the posting of messages (speech) on the internet.

15. Presently the plaintiff is being prosecuted by defendants in the Macomb County Circuit Court, in the matter of the People of the State of Michigan vs. Jennifer Burko, case number 2009-4470-FH.

16. As a direct result of the enactment of MCLA 750.411s, plaintiff and others face the constant threat of criminal prosecution, for engaging in truthful, nonmisleading constitutionally protected expression(s).

**COUNT 1**

17. Plaintiff incorporates paragraphs 1-16 of the complaint herein.

18. MCLA 750.411s is unconstitutional on it's face and violative of the First and Fourteenth Amendments for the following reasons:

- (a) MCLA 750.411s is unconstitutional as it abridges the rights of freedom of speech and expression
- (b) MCLA 750.411s does not further any compelling governmental interest(s);
- (c) MCLA 750.411s is unconstitutionally vague and overbroad.

19. For these reasons, plaintiff is threatened with jail, fines, prosecution and incarceration and other threatened and irreparable harm for which plaintiff has no adequate remedy at law.

**RELIEF REQUESTED**

Accordingly, plaintiff is entitled to:

- (a) a declaration that MCLA 750.411s is unconstitutional on it's face;
- (b) a temporary and permanent restraining order and preliminary injunction precluding continued enforcement and prosecution under

MCLA 750.411s.

(c) any other relief authorized by law, including damages, costs and attorney fees for bringing this action.



Timothy Barkovic (P-29797)  
Attorney for Plaintiff  
25805 Harper Avenue  
St. Clair Shores, Michigan 48081  
586/773-2120

Dated: December 22, 2009

## CIVIL COVER SHEET

COUNTY IN WHICH THIS ACTION AROSE: Macomb

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for use of the Clerk of Court for the purpose of initiating the civil docket sheet.

## I. (a) PLAINTIFFS

Jennifer Burko

## DEFENDANTS

Andrea LeCroy, Stephen Lathrop, and Eric Smith, in their official capacities

(b) County of Residence of First Listed

Macomb

County of Residence of First Listed

Macomb

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(C) Attorney's (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

Timothy Barkovic (P-29797)  
25805 Harper Avenue  
St. Clair Shores, Michigan 48081

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## 11. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item 111)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- (For Diversity Cases Only)
- Citizen of This State PLA ☒ 1 DEF ☒ 1 Incorporated or Principal Place of Business In This State PLA ☐ 4 DEF ☐ 4
- Citizen of Another ☐ 2 ☐ 2 Incorporated and Principal of Business In Another State ☐ 5 ☐ 5
- Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

## IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment and Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault Libel And Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury-Med. Malpractice <input type="checkbox"/> 365 Personal Inj/ry - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21: 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input checked="" type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input checked="" type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	

## V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multi district Litigation ☐ 7 Appeal to District Judge from Magistrate

## VI. CAUSE OF ACTION

(Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)

42 USC, Section 1983, challenging as unconstitutional MCLA 750.411s

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

\$ DEMAND

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) instructions:

IF ANY

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

12/22/09

FAB

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes

☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes

☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

Notes :

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